IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 03-12-2007

CORAM:

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

AND

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

O.S.A.NOs.228 and 229 OF 2002

M/s.Raasi Transport Corporation
represented by its Managing Partner
N.Swaminathan, Ex.H. & T Contractor
50, Rajaji Salai
Madras - 600 001. .. Appellant in both O.S.As

Versus

1. Central Warehousing Corporation
   rep.by Shri A.Vinoban
   Deputy Manager (General)
   O/o.The Regional Manager
   153, Eldams Road
   Madras - 600 018

2. Shri U.R.Kurlekar
   Sole Arbitrator
   Flat B-10, Golden Co.operative
   Group Housing Society
   Plot 9-A, Patparganj
   Delhi - 110 092. .. Respondents in both O.S.As

For Appellant :: Mr.P.Seshadri

For Respondents :: Mr.V.Raghavachari for
Mr.A.J.Abdul Razaak in
O.S.A.No.228 of 2002 for
Respondent No.1 in and

Mr.S.R.Sundaram for
Respondent No.1 in
O.S.A.No.229 of 2002

Prayer: Original Side Appeal Nos.228 and 229 of 2002 are preferred against the judgment and decree made in O.P.Nos578 of 1992 and 92 of 1993 dated 8.9.1999 passed by the single Judge.

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JUDGMENT

K.RAVIRAJA PANDIAN, J.

These two appeals are filed by the contractor - Raasi Transport Corporation against the common order dated 8.9.1999 made by the learned single Judge in O.P.Nos.578 of 1992 and 92 of 1993.

2. O.P.No.578 of 1992 was filed by the first respondent Central Warehousing Corporation to direct the sole arbitrator – the second respondent to file the award published by him on 10.6.1992 and pass a decree in terms of the award, whereas O.P.No.92 of 1993 was filed by the appellant herein- the contractor under Section 30 of the Arbitration Act, 1940 (Act No.X of 1940) to set aside the award passed by the second respondent. The award was dated 10.6.1992.

3. The material facts necessary for disposal of these appeals are as follows:

The appellant has become a successful bidder under the first respondent Corporation for handling and transport of food grains and fertilisers to the first respondent warehouses at Tiruchirapalli. Prior to the commencement of the period, one S.M.Sait was appointed as a contractor on temporary basis from 18.11.1988 to 17.2.1989. The appellant commenced the work on 18.2.1989. In the mean time, on 30.1.1989, a bridge nearby the warehouses of the first respondent was closed due to which the appellant has to take a deviated route to reach the first respondent godowns. The appellant on 30.1.1989 has sent a telegram to the first respondent to consider the actual distance for transportation on pro rata basis as per the tender conditions before finalising the rate. The appellant has accepted the contract without prejudice to its right to claim additional rate for the increased distance. Ultimately the contract was concluded on 6.3.1989 for a period of two years with effect from 18.2.1989. The appellant has also agreed to supply workmen at the rate of RS.10/- per day. Immediately after the appellant entering into agreement, by proceedings dated 20.3.1989 the Government has increased the minimum wages to Rs.21/- per day for casual labourers. This increase in wages was also not accepted by the first respondent in spite of the demand made by the appellant. The appellant thus sustained loss heavily in respect of the increased distance in transportation of the food grains and fertilisers and of the increase in the minimum wages payable to the work force supplied by the appellant. The appellant on 14.9.1989 sent further telegram requesting the first respondent to accept the increase in the rates for transportation as well as the labour charges and further informed the first respondent that the appellant would discontinue the work from 16.9.1989 if the two conditions have not been accepted and virtually the appellant discontinued the contract with effect from 16.9.1989. Because of the discontinuance of the work by the appellant, the first respondent appointed independent contractors on adhoc basis from 27.11.1989 to 14.2.1990 at enhanced rate of 63 percent above the schedule of rates. Subsequent to that, from 15.2.1990 to 17.2.1991, the respondent appointed independent contractors on adhoc basis at 68 percent above the scheduled rate.

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4. On 4.10.1999, the sole arbitrator has been appointed for adjudicating the claim of loss sustained by the first respondent in a sum of Rs.5,56,341/- because of the abrupt stoppage of the work by the appellant. The arbitration proceedings were went on between 28.1.1992 to 10.6.1992 in which the appellant also made a counter claim in a sum of Rs.6,19,759.82ps on the ground of extra distance transportation and payment towards work force in a higher rate as fixed by the Government.

5. On 10.6.1992, the Arbitrator passed an award as sought for by the first respondent and rejecting the counter claim made by the appellant.

6. As already stated, the first respondent filed O.P.No.578 of 1992 under Section 17 of the Arbitration Act, 1940 to pass a decree in terms of the award and the appellant filed O.P.No.92 of 1993 under Section 30 of the Arbitration Act, 1940 to set aside the arbitral award.

7. The learned single Judge upon consideration of the contentions made before him has come to the conclusion that the two events, which were vital for consideration, have happened during the pendency of the contract, because of those events, some financial disadvantage would have been caused to the appellant in performing the contract, but the changes could not be regarded as events, which could be regarded as impossible of performance. The action of the appellant in abruptly stopping the contract work forced the first respondent to engage adhoc contractors for two spells for over and above the agreed price and the first respondent is entitled to recover the price paid to the adhoc contractors from the appellant as per the contract. The learned single Judge has also confirmed the arbitration award in non-suiting the appellant for counter claim on the ground that inasmuch as the appellant has breached the contract, he was not entitled to counter claim, which has not been accepted by the first respondent. Hence, these appeals.

8. Mr.Seshadri, learned counsel appearing for the appellant has contended that notwithstanding the fact that the appellant has discontinued the work from 16.9.1989, the contract granted in favour of the appellant has not been terminated. When the contract was well in subsistence, the very appointment of an arbitrator during the currency of the contract period cannot be legally sustainable. The arbitrator has exceeded his jurisdiction in granting the relief as claimed by the first respondent, which is not the subject matter of the referral. The arbitrator cannot enlarge his jurisdiction to decide the issue on the point. Had the enhanced rate given to the adhoc contractor was offered to the appellant, he would have continued the contract. In support of the said contention, he relied on a decision of the Supreme Court in the case of MD.ARMY WELFARE HOUSING CORGANISATION VS. SUMANGAL SERVICES (P) LIMITED reported in (2004) 9 SCC 619 (paragraphs No.43, 69 and 112).

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9. On the other hand, Mr.Raghavachari, learned counsel appearing for the first respondent submitted that the arbitrator has been appointed only in accordance with the clauses contained in the agreement, which has been duly signed by the appellant. The reference to the arbitrator is also regarding the dispute touching upon the contract. The arbitrator has correctly decided the issue before it, which requires no interference by the Court. The learned single Judge has correctly rejected the contention of the appellant and made a decree in terms of the award. Having regard to the peculiar nature of work of the first respondent, a loss of a day would cause heavily to the coffer of the first respondent. The action of the appellant in abruptly stopping the work made the first respondent to engage independent contractors on adhoc basis for two spells from 27.11.1989 to 14.2.1990 and 15.2.1990 to 17.2.1991 and paid the rates as agreed with them. The amount thus spend was at the risk and cost of the appellant and the same has to be reimbursed by the appellant. The arbitrator having regard to the facts of the case with reference to the terms of the contract has granted the relief as prayed for. The learned single Judge was correct in passing the order impugned which requires no interference.

10. We heard the argument of the learned counsel on either side and perused the materials on record.

11. It is an admitted fact that the appellant has entered into an agreement and commenced the work from 18.2.1989 at the agreed rate. While that being so, because of the closure of the bridge nearer to the warehouses of the first respondent, the appellant was forced to spend little more on transportation, as the distance the appellant has to cover has increased. Likewise, the appellant was also forced to spend more towards wages of the workmen. It is purely a contractual obligation and the dispute could very well be thrashed out with the first respondent. If not accepted, legal action would have been taken for claiming escalation of rate. But the action of the appellant abruptly stopping the work from 16.9.1989 is not expected of a contractor of the first respondent Corporation, having regard to the activity of the first respondent. Thus, the first respondent was compelled to spend more money for the engagement of independent contractors for two spells at the risk and cost of the appellant as agreed in the agreement. The arbitrator, in our view, has rightly granted the award in favour of the first respondent, which they expended for the purpose of adhoc engagement of the contractors to carry out the day to day work of the first respondent. Even under the Arbitration Act, 1940, the award granted by the arbitrator could be set aside when the arbitrator or umpire has misconducted himself or the proceedings, an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Section 35 or an award has been improperly procured or is otherwise invalid. The non-suiting of the counter claim made by the appellant is also only in accordance with the agreement entered into as the lapse was on the part of the appellant only. The contention that the arbitrator has misdirected himself in the arbitral proceedings by not taking into account the loss caused to the appellant for extra distance of transportation and extra payment of wages for workmen cannot be entertained because of the action of the appellant in stopping the

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work abruptly. To support his contention, the counsel sought aid of the decision of the Supreme Court reported in (2004) 9 SCC 619 referred supra. The Supreme Court in that case has re-affirmed the well established principle of law that the arbitrator does not constitute the Court of Law, his orders and functions are not judicial ones and he cannot exercise his powers ex debito justitiae. His jurisdiction is confined to the four corners of the arbitration agreement and he can pass only such an order which may be the subject matter of the reference.

12. In this case, the subject matter of the reference was whether the appellant was liable to pay the amounts spent by the first respondent Corporation towards transportation and engagement of labour force, because of the failure on the part of the appellant in performing his part of the agreement. The arbitrator has held that the first respondent is entitled to recover the amount from the appellant as they were forced to spend the amount at the risk of the appellant, because the appellant has stopped performing the obligation accepted under the agreement. We are not able to see any force in the contention of the learned counsel for the appellant that the arbitrator has exceeded his jurisdiction in passing the award.

13. Mr.Seshadri, learned counsel appearing for the appellant has halfheartedly argued that the arbitrator was for some time advisor to the first respondent Corporation, hence, he was biased. We are not able to agree with the contention, because that was not the case of the appellant either before the arbitrator or before the learned single Judge. Even assuming for a moment the said statement of fact is correct, the appellant having assumed to the jurisdiction of the arbitrator, without raising his little finger about this point, and participated in the proceedings before the arbitrator and the learned single Judge, now cannot resile and contend that the arbitrator is biased. The contention of the learned counsel for the appellant that the arbitral proceedings cannot be initiated until the agreement is terminated is also cannot be legally sustainable, because there is no such requirement in the contract entered into between the parties, rather the agreement proceeds that the parties can refer the matter to arbitration as and when a dispute arise in respect of or touching upon the contract between the parties.

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15. For the foregoing reasons, the appeals fail and are dismissed. However, there is no order as to costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

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To
The Sub Asst.Registrar
Original Side
High Court
Madras.
+ 2 CCs To Mr.P.Seshadri, Advocate SR NO.71128

+ 1 CC To Mr. A.J.Abdul Razak, Advocate SR NO.71171

O.S.A.NOs.228 and
229 OF 2002

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